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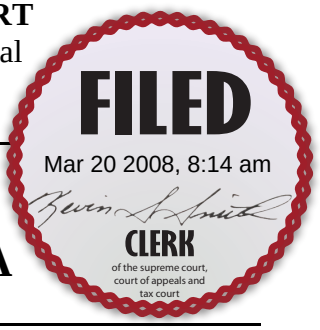

IN THE COURT OF APPEALS OF INDIANA

GARRY SHIDLER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 91A04-0703-PC-162
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert Thacker, Judge
Cause No. 91D01-0205-FB-70

March 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Garry Shidler appeals the denial of his petition for post-conviction relief from his burglary convictions,[1] following his guilty plea and direct appeal. He raises the following restated issues:

I. Whether Shidler was denied effective assistance of trial counsel;

II. Whether Shidler was precluded from raising Fourth Amendment and *Miranda* issues in his petition for post-conviction relief, and if not, whether Shidler was denied his Fourth Amendment rights or his *Miranda* rights;

III. Whether the post-conviction court abused its discretion in denying Shidler's request to subpoena several witnesses and his request for discovery;

IV. Whether the trial court violated the terms of Shidler's plea agreement; and

V. Whether Shidler was afforded due process.

We affirm.

FACTS AND PROCEDURAL HISTORY

Shidler pled guilty to two counts of burglary in exchange for the State's dismissal of his habitual offender charge.[2] The plea agreement did not specify a sentencing cap. The trial court sentenced Shidler to twelve years for each burglary to run consecutively to each other, with twenty-two years executed and the remaining two years to be served on probation.

[1] *See* IC 35-43-2-1.

[2] We use the facts from Shidler's direct appeal, *Shidler v. State*, No. 91A02-0503-CR-259, slip op. at 2-3 (Ind. Ct. App. Oct. 28, 2005).

On direct appeal, Shidler challenged the appropriateness of his sentence. This court found that Shidler's sentence was appropriate based on his character and the nature of the offense. Our Supreme Court later denied transfer.

Shidler filed a petition for post-conviction relief and requested eighteen subpoenas for individuals to appear at the post-conviction hearing. The post-conviction court granted six of the subpoenas, denied four because they were not relevant or probative, and denied the remainder because Shidler did not provide an address for the recipient. Shidler renewed his request for eight of the previously denied subpoenas and was granted four and denied four. Shidler filed several other motions for discovery, of which the trial court denied some and granted others.

DISCUSSION AND DECISION

Post-conviction proceedings are civil proceedings, and a petitioner must establish his claims by a preponderance of the evidence. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *cert. denied*, 540 U.S. 830 (2003). Because Shidler is now appealing from a negative judgment, to the extent his appeal turns on factual issues, he must convince us that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* Stated differently, Shidler must persuade this court that there is no way the post-conviction court could have reached its decision. *Id.*

Our Supreme Court has stated that post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. *Timberlake v. State*, 753 N.E.2d 591, 597-98 (Ind. 2001) (citing Ind. Post-Conviction Rule 1(1)).

> If an issue was known and available but not raised on direct appeal, it is waived. If it is raised on appeal but decided adversely, it is [*res judicata*]. If not raised on direct appeal, a claim of ineffective assistance of counsel is properly presented in a post-conviction proceeding. A claim of ineffective assistance of appellate counsel is also an appropriate issue for a post-conviction proceeding. As a general rule, however, most freestanding claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and [*res judicata*].

Id. (internal citations omitted).

I. Trial Counsel

In order for Shidler to establish that he received ineffective assistance of trial counsel he must show that: 1) his trial counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and 2) there is a reasonable probability that the result of the proceeding would have been different had counsel been adequate. *Timberlake*, 753 N.E.2d at 603 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). The first part of the test requires Shidler to show that counsel's errors were so serious that it denied him his Sixth Amendment right under the United States Constitution. *McCorker v. State*, 797 N.E.2d 257, 267 (Ind. 2003). The second part of the test requires Shidler to show that counsel's performance resulted in his being prejudiced. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). We start with a strong presumption that counsel's performance was adequate. *Stevens*, 770 N.E.2d at 746.

A. Challenge the Warrant

Shidler claims that his decision to plead guilty was based on the incriminating evidence found in his home. As such, he contends that his trial counsel's failure during

discovery to move to suppress the warrant used to search his home amounted to ineffective assistance of counsel. Assuming without deciding that the warrant was invalid, Shidler fails to show how he was prejudiced by his trial counsel's failure to contest the warrant because the remaining evidence would have been sufficient to support his burglary convictions. *See Segura v. State*, 749 N.E.2d 496, 499 (Ind. 2001). The record before us reveals that the State had an eyewitness who was available to testify that Shidler possessed and carried the stolen goods in question into his apartment and that he admitted to having stolen the goods. To the extent Shidler claims that the eyewitnesses lied to the police, Shidler failed to demonstrate any evidence at the post-conviction hearing to support his contention. *See Tapia v. State*, 753 N.E.2d 581, 587-88 (Ind. 2001) (holding petitioner's failure to present any witnesses or other matters into evidence at post-conviction hearing led to conclusion that petitioner did not meet his burden of proof for post-conviction relief.) Therefore, Shidler's trial counsel was not ineffective for failing to challenge the warrant.

B. Breach of Confidentiality

Shidler next claims that his trial counsel was ineffective for allegedly breaching her ethical duty of confidentiality. Specifically Shidler claims, without any citation to the record, that his trial counsel revealed to the State his own statements made to her and that these statements were later used by the State at his sentencing hearing.

Shidler failed to introduce the sentencing record at the post-conviction hearing. *See Hicks v. State*, 525 N.E.2d 316, 317 (Ind. 1988). Moreover, the record before us reveals that Shidler, and not his attorney, revealed the confidences about which he

complains. At the sentencing hearing Shidler was questioned about whether he told the police, his attorney, or the State that he was involved in the burglary and whether he had admitted another individual was involved. *Appellee's App.* at 141-43. From this testimony, Shidler admitted the confidence. At the post-conviction hearing, Shidler questioned his trial counsel about the incident. She never stated that she revealed any confidential communication to the State, nor was there any other evidence to support Shidler's contention. Shidler has failed to demonstrate his trial counsel's assistance was ineffective.

C. Guilty Plea

Shidler's third complaint alleges that his trial counsel's performance was so ineffective that it caused Shidler to plead guilty, "to mitigate the damage that Attorney Trent was doing . . . ." *Appellant's Br.* at 17. Generally, a plea entered after the trial court has reviewed the defendant's various rights and has made the relevant inquiries will not be overturned. *State v. Moore*, 678 N.E.2d 1258, 1265 (Ind. 1997). However, if a defendant can establish that he was coerced or misled into pleading guilty, he may have a claim for relief. *Id.* at 1266. In addressing the voluntariness of the plea, we look at the entire record before us including "the evidence before the post-conviction court, testimony given at the post-conviction hearing, the transcript of the original plea hearing, and any plea agreements or other exhibits." *Id.*

Here, Shidler claims that he was coerced into pleading guilty because the State amended its charging information to include the charge of his being a habitual offender, which increased his maximum possible sentence from forty years to seventy years.

During Shidler's post-conviction hearing, he complained that when the habitual offender count was added he felt that ". . . I'm now ready to get out. I'm scared, I'm now lookin' at, you know, a whole lot more." *P-C.R. Tr.* at 58. Shidler does not cite any evidence to suggest that he was confused or unaware of his guilty plea and admitted that he pled guilty to avoid the habitual offender charge. *P-C.R. Tr.* at 58. Shidler has failed to demonstrate that his trial counsel's assistance was ineffective or vitiated the voluntariness of his plea.

II. Free Standing Warrant and *Miranda*[3] Challenges

Shidler sought in his petition for post-conviction relief, in his argument before the post-conviction court, and seeks now on his post-conviction appeal to make a free standing challenge to the search warrant used to search his apartment and his statements made to the police. However, initially, if an issue is known and available on a defendant's direct appeal and is not raised, it is waived. *See Timberlake*, 753 N.E.2d at 597. Second, if a defendant has pled guilty, and the trial court accepted the plea, these issues are moot. *See Lineberry v. State*, 747 N.E.2d 1151, 1155 (Ind. Ct. App. 2001) (motion to suppress was moot after defendant entered guilty plea). Shidler may not make a freestanding challenge to the search warrant and his statements to police because he pled guilty.

III. Witness Subpoenas and Discovery

Shidler claims the post-conviction court abused its discretion in denying his request to subpoena two of the eighteen witnesses he requested and in denying some of

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

his discovery requests. In addition, Shidler asserts that the post-conviction court failed to enter findings as to why it refused his requests.

Because post-conviction proceedings normally occur after a trial or a guilty plea hearing, the defendant has already had the opportunity or has forgone the opportunity to discover particular evidence. *Sewell v. State*, 592 N.E.2d 705, 707 (Ind. Ct. App. 1992).

Pursuant to Post-Conviction Rule 1(5), " [a]ll rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties, ..." Under Indiana Trial Rule 26 – "General provisions governing discovery," section (B) – "Scope of discovery," a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, ..." Here, in the discovery requests that the post-conviction court denied, Shidler failed to state the scope and relevance of the material he sought to discover as it related to his petition for post-conviction relief. Instead, Shidler's request was to discover any and all evidence related to his case, and not anything particular to his petition. *See Appellant's App*. at 55-57. Therefore, the post-conviction court did not err in denying Shidler's discovery requests.

A post-conviction court has the discretion to grant or deny a petitioner's request for a subpoena. *Johnson v. State*, 832 N.E.2d 985, 994 (citing *Allen v. State*, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), *trans denied*). An abuse of discretion occurs when the court's decision is against the logic and effect of the facts and circumstances before the court. *Id.*

Indiana Post Conviction Rule 1(9)(b) provides, "If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony."

Here, Shidler argues that he was denied an opportunity to subpoena two witnesses – a post-conviction attorney and his landlord, Gene "[D]oe" Landlord. *Appellant's Br.* at 22. The attorney filed an appearance in the post-conviction proceeding, but withdrew before taking any action in Shidler's case, and Shidler failed to provide an address for his landlord. Shidler failed to include an affidavit stating the reason why either of the requested witnesses' testimony was required or what particular substance should be expected. The post-conviction court did not abuse its discretion in denying Shidler's requested subpoenas.

IV. Plea Agreement Terms

Shidler claims that the trial court violated the terms of his plea agreement by imposing two years of probation to be served after the executed portion of his sentence because probation would require Shidler to stay in Indiana, which was against a term that Shidler claims the trial court agreed to during his plea hearing. A plea agreement is a contract that binds the defendant, the State, and the trial court. *Kopkey v. State*, 743 N.E.2d 331, 340 (Ind. Ct. App. 2001), *trans denied*.

Shidler and the trial court had the following exchange regarding the agreement:

> [Shidler]: Now the uh – like if I got anything, if anything was suspended, say when I am sentenced something was suspended – or put on probation or what have you – I do want it known that I – I intend to go back

> to Missouri, I want – I don't want – I don't want nothing that's going to keep me – I mean if I have probation, or parole, or whatever, I'll execute in Missouri, but I don't want to have anything – I don't want to have nothing at this point to keep me in the State of Indiana.
>
> The Court: It's your intention then, when you're all and done with any sentence here, to move to Missouri?
>
> [Shidler]: As soon as my sentence is done, yeah, ...

Appellant's App. at 138-39.

Shidler makes no argument that his sentence violates the plea agreement. There was no provision in the plea agreement that Shidler would not be put on probation following his executed sentence. There was only Shidler's request to the court set out above. Moreover, we note that were Shidler entitled relief, that relief would require Shidler to execute the two years that the trial court suspended. Probation is a part of his sentence, and Shidler agreed to serve his sentence before he left Indiana. *See id.* Shidler has shown no error in the probation order.

V. Due Process

Lastly, Shidler claims that he was denied due process because the post-conviction court conducted itself in an improper manner in carrying on a conversation with another judge while the hearing was ongoing and in stepping off the bench to get a cup of water. Due process requires reasonable notice, an opportunity for a fair hearing, and the right to have a court of competent jurisdiction hear one's case. *McCallip v. State*, 580 N.E.2d 278, 279 (Ind. Ct. App. 1991). A trial court has a duty to always remain impartial, and the law presumes that the trial court remains unbiased and unprejudiced. *Abernathy v. State*, 524 N.E.2d 12, 13 (Ind. 1988); *Massey v. State*, 803 N.E.2d 1138-39 (Ind. Ct. App.

2004). To rebut that presumption, a defendant must establish that the trial court's, or, in this case, the post-conviction court's, conduct resulted in bias or prejudice that placed the defendant in jeopardy. *Massey*, 803 N.E.2d at 1139. Bias or prejudice exists when the trial court judge expresses an opinion of the controversy over which the judge was presiding. *Id.*

At the post-conviction hearing, while Shidler was making several motions and the post-conviction court was responding to the same, another judge walked into the courtroom, and the following exchange took place:

The Court:	You got a 1:30 Bob?
Judge Mrzlack:	Yeah, we'll do it in the other courtroom.
The Court:	Well, and I've got, I think I've got something over there too. I mean, the point is, I thought this wasn't going to take, he says four or five hours. You'd probably do that with that little grin that you have [laughter in the courtroom.] I'm sure the Court of Appeals will appreciate two judges having this kind of dialogue,[4] but.
Judge Mrzlack:	I wouldn't have expected four or five hours.
The Court:	You would?
Judge Mrzlack:	No.
The Court:	Oh, Okay. But you know you know, you have experience and I don't.
Judge Mrzlack:	This is a, probably an hour-long [unintelligible].
The Court:	I thought maybe half an hour or forty-five minutes, so

[4] This panel observes that a number of dialogues also occur on this Court that the two judges may likewise appreciate. We just don't make them matters of record for the world to read.

I was thinking I could do it and be out of your way at 1:30 or quarter-to.

Judge Mrzlack: [unintelligible]

The Court: Okay. . . . .

P-C.R Tr.. at 21-22. After the exchange, Shidler continued his motions and presented the testimony of a few witnesses. At the beginning of the interrogation of one of Shidler's witnesses, the post-conviction court stepped away from the bench to get some water. *P-C R. Tr.* at 37. The post-conviction court stated, "Thank you. Please be seated in the witness chair. You can go ahead and start, I'm getting a cup of water. I can hear right here, because the water machine's right here. Go ahead and ask your questions." *Id.* The post-conviction court heard arguments and later denied Shidler's amended petition.

Although the above exchange may have been better carried on off the bench, at no time did the post-conviction court demonstrate any bias or prejudice to Shidler's petition. At most, it indicated that the post-conviction court did not anticipate the length of Shidler's post-conviction hearing. *See Matheney v. State*, 688 N.E.2d 883, 896 (Ind. 1997) (magistrate's comments showed irritation but not prejudice). The post-conviction court's comment that it was getting water was to let the record reflect that at no time was the post-conviction court unaware of the proceeding. Shidler has failed to demonstrate that he was denied due process at his post-conviction hearing.

Affirmed.

RILEY, J., and MAY, J., concur.